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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LOUIS S. BULLARD
SPECIAL AGENT, FBI,

Petitioner,

v.

WILLIAM H. WEBSTER
DIRECTOR, FBI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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THE QUESTION PRESENTED FOR REVIEW

(1) Does a federal court have jurisdiction to review the FBI's decision to transfer a Special Agent of the FBI in the excepted service as discipline, who challenges the transfer on a factual basis as arbitrary, capricious, and an abuse of discretion under the APA (5 USC Sections 701 - 706); as based on inaccurate and untrue information under FOIPA (5 USC Sections 552, 552a); as based on protected free speech under the First Amendment; and as taking away a valuable cognizable property right to an earned office of preference (OP) earned through seniority, under the Fifth Amendment, and should he prevail, may his attorney's fees be paid?

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OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Appendix A) is reported at 623 F 2d 1042 (1980), slip opinion No. 78-3421 (8/13/80). The opinion of the United States District Court for the Southern District of Mississippi is unreported. The

judgment of that court on September 19, 1980, granting relief is attached (Appendix B).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on August 13, 1980 (Appendix A)(Memo from Clerk). A Petition for Rehearing was denied on October 20, 1980 (Appendix C). The Court of Appeals issued the Mandate on November 18, 1980 (Appendix E). Jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is conferred by 28 USC Section 1254(1).

STATUTES INVOLVED

The statutes which the case involves are 5 USC Section 552, 552a (The Freedom of Information and Privacy Acts) and (The Administrative Procedure Act 1976 Edition) 5 USC Section 701 - 706. Their pertinent text is set forth in Appendix F.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Federal Constitution which this case involves are the First and Fifth Amendments.

STATEMENT OF THE CASE

On January 16, 1978, petitioner, who is a Special Agent Accountant with 21 years service at the time, was notified by FBIHQ teletype that he was being suspended for 5 days, censured, and placed on probation for a minor incident involving the guarding of a female juror, which had occurred two months before in mid-November, 1977. The local ASAC of the FBI in Jackson, Mississippi, had headed the investigation of the incident at the time and had forwarded his report and recommendations to FBIHQ.

After being informed of the above disciplinary action on January 16, 1980, petitioner sent a teletype to FBIHQ strongly protesting the suspension for such a minor incident and

without any notice or opportunity for either pre- or post internal hearing.

On January 23, 1978, while at home on suspension, petitioner received a telephone call from the ASAC (supra) who advised that petitioner had been transferred for "official reasons" from his office of preference (OP) at Gulfport, Mississippi, to Newark, New Jersey. This transfer letter was dated January 17, 1978, the day after FBIHQ had received petitioner's teletype of protest.

Thereafter, petitioner attempted to obtain the reason for the transfer under 5 USC Section 552 and 552a, in an attempt to prepare an internal appeal to the Director of the FBI, which was the only appeal available under FBI regulations.

Petitioner was then ordered to report to Newark no later than March 1, 1978.

On February 27, 1978, a 10-day Temporary Restraining Order was obtained which was extended for a total of 20 days.

On March 16, 1978, a Preliminary Injunction was granted by the Federal Court pending receipt of materials previously requested for the appeal to the FBI Director. The Court retained jurisdiction until after the Director had ruled on the appeal to consider other relief requested.

Subsequently, the appeal was submitted by petitioner to the Director, or his agent, who denied the appeal, and a final hearing was held on August 30, 1978.

On September 19, 1978, the District Court entered a final judgment in favor of petitioner and set aside the transfer as arbitrary and capricious, and made without any competent evidence, but denying petitioner attorney's fees.

On August 13, 1980, the Court of Appeals reversed the transfer decision and affirmed the denial of attorney's fees. The opinion noted that petitioner as a Special Agent of the FBI is not afforded many of the procedural

safeguards available to other government employees. It was then held that because petitioner was excepted from the competitive Civil Service and a non-veteran, the provisions of the Administrative Procedure Act, 5 USC Section 702, were unavailable to him for judicial review.

The Court of Appeals further held that petitioner had no cognizable property interest in his OP since he had signed a letter in 1962 consenting to assignment wherever the need of the service demands.

Although the issues presented by this petitioner were again raised in the Court of Appeals by a Petition for Rehearing, the Petition for Rehearing was denied without comment.

Subsequent to the denial of the Petition for Rehearing and denial of the Motion for Stay of Mandate, petitioner's transfer to Newark was amended to Pittsburgh for "official reasons" on December 5, 1980.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

The Court of Appeals Decision Conflicts With The Decisions of This Court.

The Congress enacted the Administrative Procedure Act (APA) in 1946, 60 Stat 237, now 5 USC Section 701 et seq, with the "basic presumption of judicial review to one suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaing of a relevant statute, 5 USC Section 702, so long as no statute precludes such review or the action is not one committed by law to agency discretion, 5 USC Section 701(a)." Abbott Laboratories v. Gardner, 387 US 136, 141 (1967).

This Court in Abbott analyzed the APA's legislative history "by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation," quoting Shaughnessy v. Pedreiro, 349 US 48, 51.

This Court has stated that when agency action is directly challenged on a factual basis, it "is not excepted from judicial review by Section 701(a) of the APA (5 USC Section 701(a)), which excepts from review agency action done pursuant to statutes that preclude judicial review, or agency action which is committed to agency discretion by law; rather, Section 702 of the APA (5 USC Section 702), giving the right to judicial review to a party aggrieved by agency action, and Section 704 (5 USC Section 704), making reviewable agency action which is made reviewable by statute or which is final agency action for which there is no other adequate remedy in a Court (emphasis added), subject to the... decision to judicial review under the standard specified in Section 706(2)(A) of the APA (5 USC Section 706(2)(A)), which provides that agency action may be held unlawful and set aside if it is arbitrary, capricious, an abuse of discretion

(emphasis added), or otherwise not in accordance with law." Dunlop v. Bachowski 421 US 560, 566 (1974).

This Court held in Dunlop, quoting from Abbott, "The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the intent of Congress." Abbott Laboratories v. Gardner, 387 US 136, 140 (1967) "Only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Id, at 141.

This Court has held that disciplinary action may not be based on the disapproved content of the protected speech. Papish v. Board of Curators of the University of Missouri, 410 US 667 (1973).

This Court considered property interests in 1972 in Board of Regents v. Roth, 408 US 564, 577 (1972). The authority is clear that such a property interest can be established by mutual understanding between an employer and an employee.

Certainly the right to judicial review and to a hearing flow from constitutional violations and statutory authorization.

The Privacy Act (5 USC Section 552a) provides for payment of attorneys' fees and damages to the prevailing party in a situation where loss of a benefit (in this case, an office of preference) based on inaccurate and untrue information occurs.

Petitioner submits that the 5th Circuit Court of Appeals made an unwarranted and disparate distinction between Special Agents of the FBI in the excepted service and the rest of the Government's employees as set out in its opinion of August 13, 1980.

Further, the 5-day suspension and transfer

should never have been allowed to stand in view of the FBI's steadfast refusal to conduct any type of post action hearing totally denying petitioner's right to procedural due process under the Fifth Amendment. This Court held in Carey v. Piphus, L Ed 2d 252 (1978) "Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, ...(citations omitted) we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. We therefore hold that if, upon remand, the District Court determines that respondent's suspensions were justified, respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners."

This Court further held in Goss v. Lopez,

419 US 565 (1975) at 574, that students "do not 'shed their constitutional rights' at the schoolhouse door."

It follows that FBI Agents should not shed their constitutional rights when they are sworn to preserve, protect, and defend that same constitution.

Therefore, petitioner respectfully submits that the decision of the Court of Appeals in this case conflicts with the decisions of this Court cited above.

II.

The Court Below Has Decided An Important Question of First Impression Which Should Be Settled By This Court.

This is a case of first impression never before decided by this Court and therefore should be heard for valid reasons, including constitutional protection for members of the excepted service, the American people, and the Federal Constitution.

This Court, in Arnett v. Kennedy, 416 US

134, stressed its concern for patently arbitrary treatment of public servants.

In the case of an FBI Agent in the excepted service who has no freedom of speech in disciplinary matters to even request minimal, fair, internal due process without fear of instant, assured and total reprisal, this case then is of extreme importance to real national security because FBI Agents dare not question any order handed down from their superiors, even though they all have taken an oath to protect the constitution, out of real fear of instant suspension, firing, transfer, demotion, or any number of other terror tactics, based on imagined, real, or contrived personal derelictions.

Even though FBI regulations make provision for an appeal to the Director in personnel actions, in reality, he only reviews firings and lengthy suspensions and all other appeals are reviewed by the original judge.

Due process flies out the window and is made a mockery, when the same individual who prosecuted, convicted and sentenced the Agent is also the appellate judge.

The recent convictions of high level FBI officials for constitutional violation proves that the constitution is not immune from violation by its own sworn protectors.

Picture then an ordinary FBI Agent assigned any investigative matter who dares question a higher order. He knows there is no freedom of speech and no due process if he does speak out. Should he elect to speak, he can only await his first error, no matter how small, to get his reward from FBI management who have already labeled him a "troublemaker" and/or whistleblower.

As Mr. Justice Douglas said dissenting in Arnett, "Heretofore, as my brother Marshall has shown, we have insisted that before a vital stake of the individual in society is destroyed by government he be

given a hearing on the merits (emphasis added) of the government's claim. Among these personal and vital stakes are welfare benefits, Goldberg v. Kelly, 397 US 254; the weekly wage of a worker, Sniadach v. Family Finance Corp. 395 US 337; a person's driver's license, Bell v. Burson, 402 US 535; repossession of household goods, Fuentes v. Shevin, 407 US 67; the position of a tenured professor in a state educational institution, Board of Regents v. Roth, 408 US 564; revocation of parole, Morrissey v. Brewer, 408 US 471, Arnett v. Kennedy, 416 US 134 at 204 (1974).

"There is more than employment and a job at issue in this case. The stake of the federal employee is not only in a livelihood, but in his right to speak guaranteed by the First Amendment." Id at 204.

Justice Douglas further said, "I realize that it is the tradition of the Court to 'balance' the right of free speech against

other governmental interests and to sustain the First Amendment right only when the Court deems that in a given situation its importance outweighs competing interests. That was the approach in Pickering v. Board of Education, 391 US 563, where the Court deemed what a teacher said against the school board was more important than the board's sensibilities. The Court, however, reserved decision where the comments of an employee involved 'either discipline by immediate superiors or harmony among co-workers, Id at 570."

"His speaking may well have aroused such animosity in his superior as to disqualify him from being in charge of disciplinary proceedings[1]." and in a footnote, "1. A judge so reviled is normally not the one to sit in judgment in a criminal contempt proceeding. Mayberry v. Pennsylvania, 400 US 455." Id at 205.

"And these consequences are quite

antagonistic to the image which agencies have built. Their dominant characteristic is the application of Peter's Inversion. See: L. Peter and R. Hull, The Peter Principle 24 - 26 (Bantam ed 1970). In a few words, Peter's Inversion marks the incompetent cadre's interest in an employee's input not his output.[2]" And in a footnote, Justice Douglas quoted Peter's Inversion: "2. 'The competence of an employee is determined not by outsiders but by his superior in the hierarchy. If the superior is still at a level of competence, he may evaluate his subordinates in terms of the performance of useful work... or achieving whatever are the stated aims of the hierarchy. That is to say, he evaluates output.

'But if the superior has reached his level of incompetence, he will probably rate his subordinates in terms of institutional values; he will see competence as the behavior that supports the rules,

rituals and forms of the status quo. Promptness, neatness, courtesy to superiors, internal paperwork will be highly regarded (emphasis added). In short such an official evaluates input...

'In such instances, internal consistency is valued more highly than efficient service. This is Peter's Inversion... He has inverted the means-end relationship.'

"His input reflects his attitude toward the cadre, and toward his work. A pleasant manner, promotion of staff harmony, servility to the cadre, and promptness, civility, and submissiveness (emphasis added) are what count. The result is a great leveling of employees. They hear the beat of only one drum and march to it. (emphasis added) ...But once an employee speaks out on a public[1] issue and is punished for it, we

1. Since 1974 this Court has ruled that a public employee may criticize his employer in public and in private.

have a justiciable issue." Arnett v. Kennedy, 416 US 206 (1974).

The decision of the Court of Appeals below in this case raises important questions of federal law resolving the meaning and application of the First and Fifth Amendments of the Federal Constitution and the statutory protection of the APA, 5 USC Section 701 et seq and The Privacy Act, 5 USC 552a et seq, to FBI Agents in the excepted service.

Further, when a suit is brought directly under the constitution, a hearing must ensue. See Weir v. Muller, 527 F 2d 872 (CA 5 1977) quoted in a footnote in Butz v. Economou, 57 L Ed 2d 895 (1978).

The broad and sweeping language of the Court of Appeals below that "Bullard presents us with no basis, statutory, regulatory, or otherwise, for reviewing the decision of the FBI" (emphasis added), Bullard v. Webster, 623 F 2d 1042 (1980),

destroys completely any constitutional or statutory protection for petitioner in this case because he is in the excepted service, and cannot be condoned by this Court.

III.

The Court of Appeals Has Departed From The Accepted Course Of And Usual Course of Judicial Proceedings So As To Call For An Exercise Of This Court's Power of Supervision.

The 5th Circuit Court of Appeals has decided this matter in direct conflict with two other 5th Circuit cases granting judicial review in almost identical circumstances. In Weir v. Muller, 527 F 2d 872 (CA 5 1977), the District Court refused to grant a hearing or review for an alleged constitutional violation and the 5th Circuit, in Weir, reversed and remanded, ordering a hearing as a matter of constitutional right.

Further, in a recent case from the 5th Circuit involving similar facts to this case, the 5th Circuit accepted jurisdiction on a

wrongful discharge decision by an agency of the Government. In Sheehan v. Army and Air Force Exchange Service, 619 F 2d 1132 (5 CA 6/1980) (not competitive Civil Service but non-appropriated federal employee), the plaintiff claimed wrongful discharge and violations of controlling regulations for discharge based upon conduct off the job that allegedly reflected discredit on the defendant. The Court on appeal held:

> "The allegation that the discharge violated controlling regulations was, therefore, equivalent to an allegation of breach of an implied-in-fact contract. Such a claim is sufficient to avoid dismissal on jurisdictional grounds. At p. 1138."

See also Ashton v. Civiletti, 613 F. 2d 923 (D.C. 1979); Kizas v. Webster (DC 1980) Civil Action No. 78-983.

Since the Court of Appeals has so far departed from their own precedent, this

Court's supervisory power should be exercised.

CONCLUSION

FBI Agents have been excluded from constitutional protection because they are in the excepted service. This is an unhealthy situation for the country, the constitution and its sworn protectors as shown by recent events.

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

By: _____

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Louis S. BULLARD, Special Agent, FBI, Plaintiff-Appellee Cross-Appellant,

v.

William H. WEBSTER et al., Defendants-Appellants Cross-Appellees.

No. 78-3421.

United States Court of Appeals, Fifth Circuit.

Aug. 13, 1980.

FBI agent brought action for permanent injunctive and declaratory relief challenging his lateral transfer from Gulfport, Mississippi, to Newark, New Jersey. The United States District Court for the Southern District of Mississippi, William Harold Cox, J., granted permanent injunction against the transfer and denied agent's motion for attorney fees, and cross appeals were taken. The Court of Appeals, Thornberry, Circuit Judge, held that FBI's decision to transfer special agent from Gulfport, Mississippi, to Newark, New Jersey, because the agent's effectiveness in Mississippi had been damaged was not judicially reviewable.

Reversed in part and affirmed in part.

1. Administrative Law and Procedure ⇐668

As a general rule, a person who suffers a legal wrong because of agency action or who is adversely affected or aggrieved by agency action within meaning of relevant statute is entitled to judicial review of agency action. 5 U.S.C.A. § 702.

2. Administrative Law and Procedure ⇐750

Burden of proving nonreviewability of adverse agency action is that of the agency involved. 5 U.S.C.A. § 702.

3. Officers and Public Employees ⇐68
United States ⇐36

Neither the protections of the Administrative Procedure Act nor the Veterans Preference Act were available to FBI agent who was challenging FBI's decision to transfer him. 5 U.S.C.A. §§ 701(a)(2), 702; 5 U.S.C. (1976 Ed.) §§ 7501 et seq., 7501(b), 7511 et seq., 7512.

4. Administrative Law and Procedure ⇐324, 754

In absence of statute that explicitly precludes judicial review, agency action is committed to agency's discretion and is not reviewable when an evaluation of the legislative scheme as well as the practical and policy implications demonstrate that review should not be allowed; there must be a weighing of the need for, and feasibility of, judicial review versus the potential for disruption of administrative process.

5. United States ⇐36

FBI's decision to transfer a special agent from Gulfport, Mississippi, to Newark, New Jersey, because the agent's effectiveness in Mississippi had been damaged was not judicially reviewable.

6. Constitutional Law ⇐277(2)

FBI agent who had signed a letter in which he specifically consented to transfer for any assignment whenever the needs of the service demanded was

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thereby precluded from asserting that he had a cognizable property interest in remaining at an office to which he had been assigned ten years earlier.

7. Records ⇐67

In action brought by FBI agent for permanent injunctive and declaratory relief directing the FBI not to transfer the agent and not to interfere with his right to an administrative appeal or to obtain documents through FBI channels, trial court did not abuse its discretion in denying agent's claim for attorney fees under the Freedom of Information Act, since there was no indication that agent's request for information in order to pursue his administrative appeal was sufficient to state a cause of action under the Act, and there was no indication that the FBI only produced documents in response to court order or that FBI opposed furnishing the information. 5 U.S. C.A. §§ 552, 552(a)(4)(E).

Appeals from the United States District Court for the Southern District of Mississippi.

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

THORNBERRY, Circuit Judge:

Appellant William H. Webster, Director of the Federal Bureau of Investigation (FBI), appeals from a judgment of the United States District Court for the Southern District of Mississippi granting a permanent injunction against the lateral transfer of Special Agent Louis S. Bullard from Gulfport, Mississippi, to Newark, New Jersey. Appellant claims that the grant of the permanent injunction was improper because the FBI's decision to transfer a special agent is not judicially reviewable. In the alternative, if a broader standard of review is applicable, appellant contends that Bullard did not possess a property interest in remaining in his office of preference and there was thus no violation of the due process clause. Bullard cross-appeals, claiming he is entitled to attorney's fees. We reverse the district court with respect to the merits of the case and affirm as to the attorney's fees.

Louis Bullard is a Special Agent of the FBI. He has been assigned to the FBI office in Gulfport, Mississippi since 1968. In late 1977, Bullard was investigated by the FBI on charges of misconduct involving his guarding of a female juror who had signed a statement admitting that she accepted a bribe in order to cause a hung jury. An obstruction of justice investigation was instituted and several FBI agents were assigned to protect her in a Gulfport, Mississippi motel. Bullard and a second agent were assigned the shift from 4:00 p. m. to midnight. When their replacements arrived, they learned that Bullard and the second agent were in the motel bar with the juror. The second agent escorted the juror back to the motel room. When Bullard later appeared, he was carrying an alcoholic beverage and he had alcohol on his breath and impaired speech. Other agents observed Bullard enter the juror's room and close the door. He was later found lying on the bed, fully clothed, next to the juror while watching television. Later that night, Bullard drove home in a government automobile while apparently in somewhat of an intoxicated state. By a letter dated January 17, 1978, Bullard was censured, placed on probation, and suspended for five days beginning January 18, 1978 after a review of his misconduct by FBI headquarters.

During the course of the investigation of Bullard, the Assistant Special Agent in charge of the Jackson, Mississippi office concluded that Bullard's effectiveness in the Jackson Division had been damaged. His working relationship with other agents and the United States Attorney's Office in Jackson had become significantly impaired. Therefore, the Special Agent in charge recommended that Bullard be transferred to another office. The transfer was not recommended as further disciplinary action for the incident that occurred in November 1977. The Administrative Services Division at FBI headquarters agreed that Bullard had lost his effectiveness in Jackson and recommended that he be transferred. A decision was made at FBI headquarters to transfer Bullard to Newark, New Jersey, effective March 1, 1978. Newark was chosen because that office was critically understaffed and because it specifically needed accountants. Bullard was an accountant.

Following the FBI's denial of Bullard's request to delay his transfer until he could prepare an administrative appeal using information requested under the Freedom of Information Act, Bullard filed an action for permanent injunctive and declaratory relief in the United States District Court for the Southern District of Mississippi on February 24, 1978. The district court entered temporary restraining orders on February 27, 1978 and March 10, 1978, directing the FBI not to transfer Bullard and not to interfere with his right to an administrative appeal or to obtain documents through FBI channels.

The district court conducted a hearing on the question of whether to issue a preliminary injunction on March 16, 1978. Testimony was presented by the acting Special Agent in charge of the Jackson Division, the current Special Agent in charge of the Jackson Division, and a representative from FBI headquarters. Bullard also testified that he had consented to the following written condition in 1962:

> It is understood you are to proceed on orders to any part of the United States or its possessions where the exigencies of the service may require, and it should be clearly understood that you will be completely available for any assignment whatever and whenever the needs of the service demand * * *. Further, you cannot expect assignment to an office of your own preference.

In addition, Bullard admitted that he had initialled a similar agreement to be transferred each year and as recently as March 1977.

After the hearing, the district court granted permanent injunctive relief on May 17, 1978 from the transfer, pending the exhaustion of Bullard's administrative appeal. On March 24, 1978, the government filed a "Notice of Delivery of Records" stating that the FBI had given Bullard all of the documents and materials he had requested. On April 19, 1978, the FBI filed a motion to vacate the injunction on the grounds that Bullard had not yet made an attempt to pursue an administrative appeal. A hearing was held on the motion to vacate on June 30, 1978. The district court denied the motion to vacate on July 5, 1978, because Bullard had pursued his administrative appeal on June 28, 1978. On July 28, 1978, the FBI Director wrote to Bullard and advised him that:

> I have reviewed this entire matter and find that the action taken in your transfer out of Gulfport, Mississippi, and to Newark, New Jersey, was com-

pletely justified. The transfer decision was based upon information developed during an administrative inquiry into this matter and included in your statements.

I find no basis for reversing the transfer action taken by this Bureau and your appeal is hereby denied.

Another hearing was held on August 30, 1978. On September 19, 1978, the district court entered a final judgment in favor of Bullard that permanently enjoined his transfer from Gulfport. This appeal follows.

I. Reviewability of Transfer Decision.

[1] As a general rule, a person who suffers a legal wrong because of an agency action or who is adversely affected or aggrieved by an agency action within the meaning of a relevant statute is entitled to judicial review of the agency action.[1] 5 U.S.C. §702.

While Section 702 does not set forth the appropriate standard of review to be applied to an agency's actions, the right to judicial review is not available to the extent that the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

[2, 3] The burden of proving nonreviewability is that of the agency involved. *See Dunlop v. Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). That burden is much easier in this case because special agents of the FBI are not afforded many of the procedural safeguards available to other government employees. First, persons in the FBI are excepted from the competitive civil service. 28 U.S.C. § 536. Therefore, FBI employees do not have the procedural rights guaranteed members of the competitive civil service. 5 U.S.C. § 7501(b). Also, Bullard is not a "preference eligible veteran," a status that would afford him additional protections. 5 U.S.C. § 7512. Therefore, neither the protections of the Administrative Procedure Act, 5 U.S.C. § 7501 *et seq.*, nor the Veterans Preference Act, 5 U.S.C. § 7511 *et seq.* are available to Bullard.

[4] In the absence of a statute that explicitly precludes judicial review, an agency action is committed to the agency's discretion and is not reviewable when an evaluation of the legislative scheme as well as the practical and policy implications demonstrate that review should not be allowed. *Local 2855 v.*

1. The actual language of § 702 is as follows:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

United States, 602 F.2d 575 (3rd Cir. 1979). There must be a weighing of the need for, and feasibility of, judicial review versus the potential for disruption of the administrative process. *Kletschka v. Driver*, 411 F.2d 436 (2d Cir. 1969). Criteria suggested by the Third Circuit in *Local 2855* for making such a determination include (1) the broad discretion given an agency in a particular area of operation, (2) the extent to which the challenged action is the product of political, economic or managerial choices that are inherently not subject to judicial review, and (3) the extent to which the challenged agency action is based on some special knowledge or expertise. In light of these standards and these factors, we find that the decision to transfer Bullard is not reviewable.

[5] It would not be feasible for the courts to review each decision by the FBI to transfer a special agent. The FBI must be able to assess their manpower needs in a certain city or area of the country and be able to transfer an agent from Gulfport to a critically understaffed office in Newark. The FBI must be able to transfer an agent with accounting expertise to an office needing help in that area without interference from the courts. For the good of the agency, the FBI should be able to transfer an agent from one area of the country where he has lost his effectiveness in dealing with his co-workers without subjecting this decision to judicial scrutiny. The decision, which we deem not reviewable for determining if it was factually substantiated, was based on strained personal relationships between Bullard and the other agents and the United States Attorney. The FBI must have flexibility in making transfer decisions in order to operate the agency efficiently. Where the challenged personnel decision involves a transfer, the courts should generally not undertake a full substantive review of the decision but should still ensure that the complainant's procedural rights are satisfied. The FBI Manual of Administrative Operations provides merely for informal communication with the Director of the FBI. Bullard's appeal to the Director satisfied this procedural safeguard. As the Second Circuit stated in *Kletschka*,

> The general refusal of the courts to review the merits of personnel decisions finds additional support in the difficulty of verifying or refuting the wisdom of judgments based on partly intuitive assessments of personal competence and the ability of one man to work in harmony with others.

411 F.2d at 443.

Bullard presents us with no basis, statutory, regulatory, or otherwise, for reviewing the decision of the FBI. On the contrary, the Attorney General is empowered to establish regulations for the conduct of employees and the allocation of agency business. 5 U.S.C. § 301. Pursuant to this grant of power, the Attorney General promulgated the following regulation:

> . . . the Director of the Federal Bureau of Investigation is authorized to exercise the power and authority vested in the Attorney General by law to take final action in matters pertaining to the employment, direction, and general administration (including appointment, assignment, training, promotion, demotion, compensation, leave, classification, and separation) of personnel, including personnel in wage board positions, in the Federal Bureau of Investigation.

28 C.F.R. § 0.137. A transfer decision is based upon complex considerations of agency requirements as well as the ability and personal characteristics of the employee. *Bramley v. Webster*, 476 F.Supp. 351 (E.D.Pa.1979). Because this is not a decision that, balancing the need for review against the burden it imposes, should be examined by the courts, we hold that the district court erred and must accordingly be reversed.

[6] In order to succeed on the due process claim, Bullard must show that he has a cognizable property interest in remaining at the Gulfport office. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). But Bullard is precluded from asserting such a property interest in light of his actions. In 1962, he signed a letter in which he specifically consented to the following written conditions:

> It is understood you are to proceed on orders to any part of the United States or its possessions where the exigencies of the service may require, and it should be clearly understood that you will be completely available for any assignment whatever and whenever the need of the service demand * * *. Further, you cannot expect assignment to an office of your own preference.

Bullard initialled a similar agreement each year and as recently as March 1977. As such, Bullard cannot claim that he has a property interest in retaining his office of preference in Gulfport.

II. Attorney's Fees.

[7] The district court denied Bullard's claim for attorney's fees and he cross-appealed. While there is no indication that the district court considered Bullard's Freedom of Information Act (FOIA) claim when it denied attorney's fees, the denial should be affirmed even if that claim was considered. A court "may assess" reasonable attorney's fees and other costs in any case brought under the FOIA where the complainant has "substantially prevailed." 5 U.S.C. § 552(a)(4)(E). First, there is no indication that Bullard's request for information in order to pursue his administrative appeal was sufficient to state a cause of action under the FOIA. Second, there is no indication that the FBI only produced the documents in response to the court order or that the FBI opposed furnishing the information. It is not enough that Bullard requested information and it was provided. The FBI would have to oppose the release of the documents and Bullard would have to substantially prevail. *Vermont Low Income Advisory Council v. Usery*, 546 F.2d 509 (2d Cir. 1975). Third, the award of attorney's fees is within the sound discretion of the court. There is no indication that the trial court abused its discretion in denying the award, especially in light of the clear lack of any public benefit from Bullard's suit. *See Blue v. Bureau of Prisons*, 570 F.2d 529 (5th Cir. 1978).

REVERSED IN PART; AFFIRMED IN PART.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DISTRICT

(Filed Sep. 19, 1978)

Civil Action No. S78-0050(C)

LOUIS S. BULLARD, SPECIAL AGENT, FBI

Plaintiff,

v.

CLARENCE M. KELLY, DIRECTOR, ET AL

Defendants

This is an extremely sensitive matter before the Court involving an internal incident with the FBI which was heard by the Court on August 30, 1978 on application for a permanent injunction. Bullard has been with the Department since 1956. The controversy here arises out of an incident which occurred at a motel on the Coast where Bullard was engaged in the protective custody of a female juror from this Court. The Department of Justice contends that

this Court has no jurisdiction whatsoever to grant an injunction and is meddling with the internal affairs of this agency in even conducting a hearing here. This Court very positively but regretfully disagrees with that contention. This case must be examined and considered in context.

Louis S. Bullard was born on October 20, 1937. He has been with this Department as a Clerk from 1956 to 1962. He has been with the agency as an agent since January 15, 1962. He is an accountant, an instructor in fingerprinting and serves the agency well on the Mississippi Gulf Coast. He is fluent in his mastery of Spanish and that circumstance is valuable to the agency at this particular port at Gulfport, Mississippi. Significantly, the agency has rated Louis S. Bullard as excellent every year he has been with the agency since 1962, including the year 1977 which includes the year of this unfortunate incident. Bullard had some family trouble resulting in a recent divorce from his

wife. This family has three fine children including seventeen year old Tanya, a fifteen year old boy and a thirteen year old girl. Significantly, this older daughter and the son live with their father in Gulfport.

Bullard was directed from the field to assist another agent in providing protective custody to a female juror at a motel in Gulfport, Mississippi. This juror was not under arrest but voluntarily consented to agency protection in this manner for good reason. The juror had been instrumental in causing a mistrial in a case before this Court at Jackson. She is a young married female with two minor children. The agents stayed in one room and the juror with her seventeen year old brother and two minor children stayed in a connecting room at the motel. The juror became restless and advised the agents that she wanted to go to a nightclub for the evening and that she was about to become "stir crazy" from confinement. She was taking prescription diet pills. She advised

the agents that she simply could not go to sleep without alcoholic assistance. Bullard diplomatically parried her questions and demands and finally yielded to following her to the bar in the motel at a late hour. Undoubtedly, the juror got drunk on her vodka and gin drinks. Bullard yielded to her taunting and critizing him as a panty waist and participated in alcoholic drinking while on duty. Bullard went off duty at 12:00 o'clock midnight on November 19, 1977. Undoubtedly, Bullard got drunk and was drunk and engaged in loud talk, and realized his condition at the time and walked around the parking lot until he felt it safe to enter his government vehicle to travel home sometime after 3:00 a.m. on November 20, 1977--Sunday morning.

The Court has carefully read and considered every word in every exhibit, affidavits and statement regarding this incident which has been blown completely out of context. Bullard was not an expert at protecting a criminal juror

even though the juror were <u>were</u> female. Gossip, conjecture and wild inferences have pervaded this incident and made it appear to be a reflection upon what Court knows to be the finest branch of the Executive Department. The record reveals that Bullard did not have any sexual relations with this juror. He did not drive the Government vehicle while he was drunk but drove the vehicle home without incident after staying out in the fresh air and walking around until he could safely do so. It is an unfair assumption so far as this agent is concerned, and is an unjust and improper conclusion so far as the agency is concerned to ruin this agent and destroy his usefulness during his prime in life for such a trivial incident.

This Special Agent for the FBI has lived in Gulfport and made his home there and raised his family there during the past ten years. Some years ago his home was destroyed by Hurricane Camille which hit the Coast with the hardest blow recorded within a century. He rebuilt his

home and financed it with 3% money which certainly cannot be duplicated today even if he found another home in another city at some price within his reach. His seventeen year old daughter was injured on a ride at an amusement park which resulted in a rib punturing her lung. She is also under the care of an orthopedic surgeon for five fractured and disarrayed vertebrae. Her doctor testified that a removal of Tayna to another location under the circumstances would be extremely detrimental to her for several different reasons.

Fred Woodworth is Unit Chief in the Administrative Service Section of the FBI and has been in that place for eight years. It is his job with the agency to impose penalties or recommend penalties for disciplinary matters. His unit recommended that Bullard be censured, placed on probation and suspended without pay for a period of five days. Mr. Woodworth was asked about Bullard getting drunk and then driving the vehicle home: "That in your opinion was sufficient

for the circumstances that existed at the time, wasn't it? A. Yes, sir." The record convinces the Court that this four man committee on internal irregularities decided quite fairly and quite impartially that Bullard had his hands full with his hardheaded and determined subject who had her own plans and thinking for her activities on this particular evening when she could not sleep and had to have alocholic assistance in order to make it through the evening. Under such circumstances on January 17, 1978, Clarance M. Kelly, Director, wrote Louis S. Bullard: "In view of the seriousness of the foregoing, you are being suspended from duty without pay from the close of business January 18, 1978 and placed on probation. In the future you will be expected to fulfill your obligations in a more professional manner in order to preclude further criticism of this nature.

Then on January 18, 1978, Clarence M. Kelley, Director, again wrote Louis S. Bullard about the same incident and as a penalty therefor advised

him that: "Your headquarters are changed for official reasons from Gulfport, Mississippi to Newark, New Jersey effective upon your arrival there on or after this date." Finally, Bullard was instructed to report to Newark, New Jersey by March 1, 1978. Bullard has been with the Department since 1956 and is effectually a tenured employee and has every right to expect from the agency fair and even handed treatment in their imposition and execution of double penalties for the same offense. The Director for many years has recognized the rights of Special Agents like Bullard to select the office of their preference which is Gulfport, Mississippi; yet that unwritten and deeply engrained obligation of the agency to its Special Agents is paid no attention to in this case. It has been and is suggested on behalf of the agency that Bullard has not shown that any of his rights have been violated, disregarded or ignored in this rather remarkable circumstance. That is a remark or conclusion pretty typical of an advocate

but not of a conscionable employer of this high class agency.

It is suggested as a gossipy conclusion that Bullard has lost his effectiveness as an agent and that he cannot work with other Special Agents and they will not work with him in the district. The agency steadfastly objected to any testimony on behalf of Bullard. Mr. Ben F. Greaves, Supervisory Resident Agent in the Gulfport office, was in charge of this detail on November 19-20, 1977 at this motel. He was present in the courtroom throughout this hearing on August 30, 1978 at Biloxi, Mississippi but did not testify. It was not contradicted that Bullard went up to Picayune on July 26, 1978 to take charge of a bank robbery there. A black male vaulted over the teller's counter and took possession of $1,500 of the bank's cash. Bullard and another agent were assigned by Mr. Ben F. Greaves to solve the case. They solved the case on the same evening and Mr. Murray, Assistant Special Agent in charge of the Jackson

office, telephoned Bullard and told him that he had done an excellent job. It must be and is admitted that there is some jealousy and ill feeling between Bullard and some of these Special Agents. But in April 1978 Bullard was rated for his ability and expertise as an agent as excellent by his supervisor, Mr. Greaves. Mr. Bullard has now been rated by his superior in this agency as excellent for the past twenty-one years. His supervisor, Mr. Greaves, not only attested to the validity of that rating of excellent, but Mr. John Kelley, Agent in charge of the Jackson office, likewise signed that rating of Mr. Bullard. Bullard has used his Spanish effectively as well as his knowledge of fingerprinting in connection with stowaways on banana boats coming in to Gulfport. Since the November 1977 incident, Mr. Greaves and Mr. Bullard made trips to Orlando, Florida to Federal court in a bank robber case where the bank robber confessed to four bank robberies based on Bullard's fingerprint confrontation. The facts

are that since the November 1977 incident: "Things have been the same as they have always been" according to Mr. Bullard's undenied and and unchallenged statement.

The Department of Justice relies implicitly and resourcefully upon Sampson v. Murray, 415 U.S. 61, 94 S. Ct. 937, to indicate lack of Jurisdiction here, but this Court is of the opinion that such reliance is misplaced. This Court certainly does not have any need for any new business or new sources of business but it is regretfully the conclusion of this Court that it does have the power and the duty to hear and determine this particular case. It is the considered view of this Court that this record does not contain any substantial competent evidence to support the conclusions of the agency in this case based on hearsay and largely on the figment of the imagination of some of the informants. Heresay is not condemned with the same stamp of disapproval as it was in another day but there are even exceptions and limitations to its

present acceptability. The Acting Special Agent in charge of the Jackson office initially imposed the sentence. Mr. Clarence M. Kelley, as Director, was soon thereafter replaced. Mr. Murray, Acting Special Agent in charge of the Jackson office, was soon thereafter replaced by Mr. John Kelley as Special Agent in charge. These confusing changes have contributed much to the resulting conditions, and to some extent, the distortion of this November 1977 incident. Nobody can disagree with the suggestion that even if Bullard as Special Agent was off duty that his activities were so colorable and so badly reflected upon and tarnished the good name of the FBI that he should be reprimanded and placed on probation. Mr. Bullard should understand that his further connection with the Department must depend entirely upon his performance and effectiveness as a Special Agent in the performance of his duties, in keeping with the high tradition of that office as established by Mr. Hoover. A careful

examination and consideration of every piece of evidence and testimony in this record reveals to the Court that there is no substantial evidence to be found in this record to justify and support the arbitrary and capricious action of the Department in connection with the tenure and service of this Special Agent. The proof in this record convinces this Court that Louis S. Bullard is not only an effective and useful and productive Special Agent but the undisputed proof here shows that he has been able to work effectively with other agents including his own supervisor at Gulfport. The action of the Department in denying tenure to Bullard and denying him the right to remain at his post of duty in Gulfport, Mississippi will be reversed. The injunction against the directive assigning him to Neward, New Jersey will be vacated and the defendants will be assessed with all court costs incurred in this case.

Mr. Bullard's attorney submits a bill for his services of $5,448.64. It is the view of

this Court that these defendants under the circumstances in this case are not liable for the payment of these fees. The correct rule is announced in Alyeska Pipeline Service Company v. Wilderness Society, 420 U.S. 240, 95 s.Ct. 1612, 1616 where the Court held: "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser. We are asked to fashion a far-reaching exception to this 'American Rule'; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals."

A judgment accordingly may be presented to the Court by plaintiff's counsel for entry within five days under the rules of this Court.

HAROLD COX
United States District Judge
September 19, 1978

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

(Filed Oct. 2, 1980)

No. 78-3421

LOUIS S. BULLARD

Special Agent, FBI,

Plaintiff-Appellee,

Cross-Appellant,

versus

WILLIAM H. WEBSTER, ET.AL.,

Defendants-Appellants,

Cross-Appellees,

Appeal from the United States District Court

for the Southern District of Mississippi

ON PETITION FOR REHEARING

(October 20, 1980)

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered

cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ (Illegible)

United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

(Filed Nov. 21, 1980)

No. 78-3421

LOUIS S. BULLARD,

Plaintiff-Appellee,

versus

WILLIAM H. WEBSTER, ET AL.,

Defendants-Appellants,

Cross-Appellees.

Appeal from the United States District Court

for the Southern District of Mississippi

ORDER

(X) The motion of appellees for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

/s/ (Illegible)

UNITED STATES CIRCUIT COURT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

(Filed Nov. 21, 1980)

No. 78-3421

D. C. Docket No. CA S78-0050(C)

LOUIS S. BULLARD,

Special Agent, F.B.I.,

Plaintiff-Appellee

Cross-Appellant,

versus

WILLIAM H. WEBSTER, ET AL.,

Defendants-Appellants

Cross-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the transcript of the record from the United States

District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed in part; affirmed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff- appellee/cross appellant pay the costs on appeal to be taxed by the Clerk of Court.

August 13, 1980

ISSUED AS MANDATE: Nov. 18, 1980

APPENDIX F

Statues Involved

1. 5 USC, Section 701 - 706 (The Administrative Procedure Act)

The pertinent portions of this statue are set out verbatum as follows:

701. Applications; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that -

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer

or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: PROVIDED, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title) and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

704. Actions Reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

706. The Agencies Generally

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and

determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...

2. 5 USC, Section 552, (a), (4), (E) (Freedom of Information Act)

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

3. 5 USC, Section 552a (g) (1) Civil Remedies, (C), (g), (4), (A), (B) (Privacy Act of 1974)

"(g) (1) Civil Remedies - Whenever an agency

"(C) fails to maintain any record concerning any individual with such accuracy, relevance,

timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

"(4) In any suit brought under the provisions of subsection (g) (1) (C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

"(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

"(B) the costs of the action together with reasonable attorney fees as determined by the court.

APPENDIX G

Constitutional Provisions Involved

U. S. Constitution

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

"nor be deprived of life, liberty, or property, without due process of law;"

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No. 80-1228

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS S. BULLARD, PETITIONER

v.

WILLIAM H. WEBSTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1228

LOUIS S. BULLARD, PETITIONER

v.

WILLIAM H. WEBSTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a Special Agent of the Federal Bureau of Investigation, contends that the court of appeals erred in concluding that the decision by the FBI to transfer him from the duty station he prefers to another duty station is "agency action * * * committed to agency discretion by law" (5 U.S.C. 701(a)(2)) and is thus not judicially reviewable under the Administrative Procedure Act.

1. From 1968 to March 1978, petitioner was assigned to the FBI office in Gulfport, Mississippi. In November 1977, petitioner was involved in an incident that led to charges of misconduct. The pertinent facts are as follows: Petitioner was assigned to protect a witness in a Gulfport motel (II R. 84-85). Petitioner's shift ended at midnight (II R. 86). At approximately 12:15 a.m., a relief agent found petitioner lying down (fully clothed) next to the witness on her bed (II. R. 87). The relief agent told petitioner to leave. Some time

later, petitioner drove home in a government vehicle while apparently in a somewhat intoxicated state (Pet. App. 10a).[1]

After a review of petitioner's conduct by FBI headquarters he was censured, placed on probation and suspended for five days without pay (II R. 90). Based on the incident, the acting Special Agent in charge of the Jackson, Mississippi office recommended that petitioner be transferred to another office. The transfer was not intended as a further punitive measure, but was recommended because of the belief that petitioner could no longer work effectively in the Jackson Division (II R. 88, 116-117, 122-123, 136). FBI headquarters ordered petitioner transferred to Newark, New Jersey, effective March 1, 1978. The Newark office was chosen because it was understaffed and because it needed accountants (petitioner is an accountant) (Pet. App. 3a).

2. On January 17, 1978, petitioner filed a Freedom of Information Act and Privacy Act request for all documents relating to his case. On February 13, 1978, the FBI responded that his request would be handled in due course. Petitioner then requested the FBI to delay his transfer until he received the documents. This request was denied.

Thereafter, petitioner brought suit in the United States District Court for the Southern District of Mississippi, seeking to enjoin his transfer pending his appeal of the transfer to the FBI Director. The district court initially entered temporary restraining orders barring the transfer until petitioner could obtain the documents necessary to pursue his administrative appeal.

---

[1]Petitioner offered the explanation that the witness had insisted on going to a bar for a drink and that he felt it was his duty to accompany her. After the conclusion of his shift at midnight petitioner took a drink. Since the drink made him dizzy, he lay down on the witness' bed (although other FBI agents occupied an adjoining room, where presumably he could have rested (II R. 82-90)).

At a hearing on the question whether an injunction should issue, petitioner admitted that in 1962 he had agreed to the following written conditions:

> It is understood you are to proceed on orders to any part of the United States or its possessions where the exigencies of the service may require, and it should be clearly understood that you will be completely available for any assignment whatever and whenever the needs of the service demand * * *. Further, you cannot expect assignment to an office of your own preference.

(II R. 32). Petitioner further admitted that he had initialed a similar agreement in 1977 (II R. 33-34). He claimed, however, that there had been an informal unwritten understanding that a senior agent would be assigned to the office of his preference (II R. 32). Following the hearing, the district court, on March 17, 1978, enjoined petitioner's transfer pending the exhaustion of his administrative appeal (I R. 20-22).

On March 24, 1978, the FBI represented that petitioner had received all of the documents that he had requested. Thereafter, on July 28, 1978, the FBI Director denied petitioner's administrative appeal of his transfer (Pet. App. 3a-4a).

After further judicial proceedings, the district court entered a final judgment permanently enjoining the transfer (Pet. App. 7a-20a). The court rejected the government's contention that it was without jurisdiction to review the FBI's decision to transfer petitioner (*id.* at 17a) and concluded that the transfer was not supported by substantial evidence and was arbitrary and capricious (*id.* at 19a). In addition, the court denied petitioner's request for attorney's fees (*id.* at 19a-20a).

The court of appeals reversed in part (Pet. App. 1a-6a; 623 F. 2d 1042). The court ruled that the FBI's decision to

transfer an agent is unreviewable under the Administrative Procedure Act because it is committed to agency discretion by law (Pet. App. 4a-6a). Furthermore, the court concluded that petitioner could not assert a due process claim because he did not have a cognizable property interest in remaining at the Gulfport office in light of his agreement that as a condition of his employment he would be subject to assignment anywhere in the United States. Accordingly, the court of appeals reversed the judgment of the district court granting the injunction. On petitioner's cross-appeal, the court of appeals affirmed the district court's denial of attorney's fees (*ibid.*).

3. The decision of the court of appeals is correct and does not conflict with decisions of this Court or any court of appeals. Further review is therefore unwarranted.

a. Petitioner contends (Pet. 7-9, 20) that a decision to transfer an FBI special agent is judicially reviewable under the Administrative Procedure Act. That Act, however, does not authorize judicial review of personnel actions that are committed entirely to agency discretion. 5 U.S.C. 701(a)(2). In determining whether the transfer decision is committed to agency discretion and hence unreviewable, the court of appeals focused on several factors, including (1) the degree of discretion given an agency in an area of operation; (2) the degree to which political, managerial and economic choices, which are inherently not subject to review, are involved; and (3) the extent to which the challenged action is subject to agency expertise (Pet. App. 5a). See *Local 2855, AFGE (AFL-CIO)* v. *United States*, 602 F. 2d 574, 578-580 (3d Cir. 1979). The court concluded that agency transfer decisions are based on "complex considerations of agency requirements as well as the ability and personal characteristics of the employee" (Pet. App. 6a). The court therefore held that the merits of a transfer decision are not judicially reviewable (*id.* at 5a, 6a). This holding is consistent with the

decisions of other courts that have considered this issue. See, *e.g.*, *Kletschka* v. *Driver*, 411 F. 2d 436 (2d Cir. 1969); *Bramley* v. *Webster*, 476 F. Supp. 351 (E.D. Pa. 1979).[2]

b. Petitioner's remaining claims are plainly without merit. Petitioner contends (Pet. 10) that he had a property interest in his duty assignment and that the transfer deprived him of that property interest without due process of law. But petitioner points to no statutory or regulatory provision indicating any entitlement. On the contrary, as the court of appeals noted (Pet. App. 6a), petitioner consented to written conditions specifying that he could not expect assignment to the office of his preference. Petitioner's unsubstantiated suggestion that he understood that senior agents could remain in their office of preference is insufficient to give rise to a cognizable property interest. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).[3]

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[2]In any event, in light of the incident related above, it cannot reasonably be contended that the FBI's decision to transfer petitioner out of the Jackson Division was arbitrary or capricious.

[3]Petitioner's assertion (Pet. 20-22) of an intra-circuit conflict is incorrect and does not, in any event, warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In *Weir* v. *Muller*, 527 F. 2d 872 (5th Cir. 1976), the plaintiff brought a *Bivens*-type action, claiming that federal officials and two federal agencies had deprived him of due process in an investigation leading to his criminal prosecution. The court of appeals simply held that the district court had federal question jurisdiction under 28 U.S.C. 1331.

Sheehan v. *Army and Air Force Exchange Service*, 619 F. 2d 1132 (5th Cir. 1980), petition for cert. pending, No. 80-1437 (filed Feb. 23, 1981), is also inapposite. *Sheehan* involved a suit by a former employee of a military exchange service for wrongful discharge. The Fifth Circuit found that the employee had an implied-in-fact contract with the exchange service that the service would adhere to certain regulations imposing procedural requirements for employee dismissals. There is no basis in the present case for a claim that petitioner had an implied-in-fact contract with the FBI that he could only be transferred after certain procedural requirements were met. As the court of appeals correctly observed (Pet. App. 4a), "special agents of the FBI are not afforded

Petitioner's suggestion (Pet. 13-19) that the transfer violated his First Amendment rights is also insubstantial. In the courts below petitioner argued that his transfer was in retaliation for his request that his suspension be delayed (II R. 13; Pet. Ct. App. Br. 11, 18). He based this argument on the fact that the letter notifying him of his transfer was dated one day after he requested the delay. Apart from petitioner's bare suggestion of retaliatory motive, there is nothing in the record to indicate any attempt by the FBI to punish petitioner for protesting his transfer.

Finally, petitioner claims (Pet. 10) that he should have been awarded attorney's fees. The court of appeals correctly concluded (Pet. App. 6a), however, that petitioner was not entitled to attorney's fees under the Freedom of Information Act (even assuming that this suit may be viewed as an action under the FOIA). Attorney's fees may be awarded under the FOIA but the plaintiff must show that the institution of the suit was necessary for the release of the documents. 5 U.S.C. 552(a)(4)(E); see *Cox* v. *United States Department of Justice*, 601 F. 2d 1, 6 (D.C. Cir. 1979).[4] Here, as the court of appeals pointed out (Pet. App. 6a), there has been no showing that the FBI provided the documents only in response to the suit or that the FBI opposed furnishing the information. Petitioner has merely shown that he requested information and it was released. This is

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many of the procedural safeguards available to other government employees." FBI agents are part of the "excepted service" and thus, as a general matter, are not entitled to the procedural protections afforded to members of the competitive Civil Service. See 28 U.S. 536; 5 U.S.C. 7501(a). Moreover, petitioner is not entitled to the procedural protection of the Veterans Preference Act, 5 U.S.C. 7511 *et seq.* and, in any event, a transfer decision is not an "adverse action" (5 U.S.C. 7511(2)) to which the procedural protections of that Act apply. See *Leefer* v. *Administrator, NASA*, 543 F. 2d 209 (D.C. Cir. 1976).

[4]The Privacy Act of 1974 contains a similar provision, 5 U.S.C. 552a(g)(3)(B).

insufficient to establish an entitlement to attorney's fees. See *Vermont Low Income Advocacy Council* v. *Usery*, 546 F. 2d 509 (2d Cir. 1976). Moreover, even if petitioner had shown that the suit was necessary for release of the documents, he has not shown, nor could he show, that the district court abused its discretion in denying an award of attorney's fees. See *LaSalle Extension University* v. *FTC*, 627 F. 2d 481 (D.C. Cir. 1980); *Blue* v. *Bureau of Prisons*, 570 F. 2d 529 (5th Cir. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1981

DOJ-1981-03

No. 80-1228

APR 13 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LOUIS S. BULLARD
SPECIAL AGENT, FBI,

Petitioner,

v.

WILLIAM H. WEBSTER
DIRECTOR, FBI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER TO THE MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner, a Special Agent Accountant of the Federal Bureau of Investigation (FBI), contends that the District Court was correct in concluding:

(1) that the decision by the FBI to transfer him was arbitrary and capricious and made without any evidence and was additional punishment for protesting a suspension in violation of the U.S. Constitution Amendment I and 5 USC 701 et. seq., and as such was an abuse of discretion not protected by 5 USC 701(a) (2), as clearly set forth in this court's decision in Dunlop v. Bachowski, 421 US 560 (1974) (Pet. 7-9, 20); (2) that the disciplinary transfer deprived Petitioner of a valuable cognizable property right to an earned office of preference through seniority, in violation of the Fifth Amendment to the U.S. Constitution; (3) that the transfer was retaliation for Petitioner's strongly worded teletype of protest sent after notification of a five day suspension received two months after the alleged "loss of effectiveness" incident

in violation of the First Amendment right to responsible protected speech and; (4) that the transfer was based on inaccurate and untrue information in violation of 5 USC 552a, in that the Acting Special Agent in Charge in Jackson stated his reason for Petitioner's "loss of effectiveness" was that other agents had said they would not work with Petitioner when, in fact, no such remark or statement was ever made, which was brought out in the District Court below.

Petitioner also contends that the Court of Appeals erred in concluding that the FBI has no internal regulations granting an office of preference based on seniority which would comprise a cognizable property interest, and also that Petitioner could point to no regulatory provision indicating any entitlement which regulations and policies were contained in

Petitioner's internal appeal to the FBI Director, which was an exhibit in the record in the District Court and available to the Court of Appeals and apparently overlooked.

In any event, the official FBI internal regulations regarding office of preference (OP) transfers are set forth below.

1. From December, 1956, to January, 1968, Petitioner was assigned to FBI offices at FBIHQ (twice); Washington Field Office (twice); Quantico, Virginia; Albany, New York; San Juan, Puerto Rico; New York City, New York; and finally received his OP in January, 1968, to Gulfport, Mississippi, where he remained assigned until the "loss of effectiveness" transfer to Newark, New Jersey, on January 17, 1978, a decade after achieving his OP.

Judicial action prevented the transfer

thereafter until March 18, 1981.

At no time had Petitioner "lost his effectiveness" at Gulfport and he continued to perform his duties as a Special Agent of the FBI, Gulfport, Mississippi, from November, 1977 (the time of the incident) through March, 1981, approximately three and one-half years without further incident.

Respondent fails to advise this court that the witness being guarded was accompanied at all times by her 17 year old brother and two minor children and suggests that Petitioner was lying down (fully clothed) next to the witness on her bed, which reads like a cheap novel, when in fact, Petitioner was sitting against the headboard of the bed watching TV.

The witness's brother was on the other bed, also watching TV. The chairs in the room could not be used as they were filled with dirty dishes from several meals.

Petitioner drove home in a Government vehicle without incident, and was not drunk.

On December 5, 1980, the Newark transfer was amended from Newark to Pittsburgh for "official reasons," another non-OP.

The District Court found that the Newark transfer was a further punitive measure and therefore set it aside as arbitrary and capricious.

2. At a hearing on the question of whether an injunction should issue in March, 1978, it was determined that there was no information in the administrative record to support the Acting Special Agent in Charge's conclusion that Petitioner had "lost his effectiveness" because other agents had said they could not work

with him. This type of situation is exactly why the provisions of the Privacy Act of 1974 (5 USC 552a (g) (3) (B) were enacted by Congress to prevent loss of a benefit (such as an OP) based on inaccurate and untrue information and also provided for payment of attorney's fees to the prevailing party.

Petitioner testified that he and all Agents, when first entering on duty, had agreed to assignment anywhere and at any time and that they could not expect an office of preference AT THE BEGINNING OF THEIR CAREERS (emphasis added); however, all beginning agents were told at the outset that this policy was modified by a written OP policy based on seniority, which constitutes much more than an implied-in-fact contract between the FBI and its agents. See Ashton v. Civiletti, 613 F. 2nd 923 (D.C.C. 1979); Board of

Regents v. Roth, 408 US 564 (1972); Kizas v. Webster, Civil No. 78-983 (D.C. 1980), which recognized a contractural preference within the FBI for clerical employees having college degrees to be given a preference for the Agent's position, which constituted a cognizable property interest. See also Sheehan v. Army and Air Force Exchange Service, 619 F. 2d 1132 (CA 5 June, 1980).

The official FBI Office of Preference Transfer Policy is found in its Manual of Administrative Operations (MAOP) as follows:

"Part I, Section 11, Transfers

11-8 SPECIAL AGENT OFFICE OF PREFERENCE (OP) TRANSFER

11-8.1 General

(1) The OP system was established in order to provide a means to reward Agents for faithful service by sending them to

"an office of their choice. This system is based generally upon SENIORITY (emphasis added), consistent with the needs of their service and budgetary considerations. If an Agent receives an OP transfer, that Agent will not be considered for another OP for five years.

(2) Agents are cautioned to keep their listed OP current. As a reminder, each office will receive semiannually a printout listing each Agent assigned to that office and his/her respective OP. This printout should be reviewed by all Agent personnel for accuracy. To change an OP, the Agent must submit form FD-314.

11-8.2 OP Transfer Policy - New York Office

Agents assigned to the New York Office in excess of five years and who are not in their office of preference will be given every possible consideration for

"transfer to their OP. New York Office Agents will be given priority consideration for an OP transfer over other Agents providing there is no substantial difference in the lengths of Bureau service.

11-8.3 OP Transfer Policy - San Juan Office

Agents assigned to the San Juan Office for five years of continuous service will be given every consideration for a transfer to an office of their preference, consistent with the needs of the service."

Further evidence of the FBI Director's concern about FBI OP Policy was revealed in a recent printed, nine-page document dated February 23, 1981, which read, in part, as follows:

"A Message to All FBI Employees from Director William H. Webster

"I write to you as I begin my fourth year as Director ***

'In planning for 1981, I have asked our executives to give special emphasis to the needs of our employees, to reexamine old policies and programs which may be creating unnecessary hardships in these times and to recommend changes, including legislative changes, which would improve the quality of life in the Bureau.'***

'Transfers. Concern was expressed that Office of Preference transfers may be unevenly applied *** THE OFFICE OF PREFERENCE POLICY***MUST NOT BE SUBVERTED BY INTERNAL POLICIES.'" (Emphasis added).

Clearly, the above written regulations and policy establish a cognizable property interest in an OP which is completely ignored by respondent. (Mem. Opp. Pages 3, 5). Board of Regents v. Roth, 408 U.S. 564, 577 (1972), obviously, agents of the FBI in their senior years rely on the Office of Preference

Policy which is written, expressed and implied, and is more than an understanding, in their daily lives as do their families for a sense of security as regards field agents in their residence who are not interested in administrative advancement, which by its nature entails transfers.

The cases cited by Respondent as being consistent with the holding of the Fifth Circuit Court of Appeals is misplaced (Mem. Opp. Pages 4, 5). Bramley v. Webster, 476 F. Supp. 351 (Ed. Pa. 1979) has no disciplinary aspect and Kletschka v. Driver, 411 F. 2d 436 (2nd Circuit 1969) was remanded to the District Court for a hearing on a ground of a constitutional violation of freedom of speech.

Other courts have held that the Government must follow constitutional principles even if their regulations do not.

Keane v. Berry, 416 F. Supp. 858 at 859 (1976).

The proposition that FBI Agents are part of the "excepted service" (28 US 536) only excepts them from 5 USC 7501(a) (competitive civil service) and 5 USC 7511 et. seq. if they happen not to be veterans, and does not except them from 5 USC 702 et. seq. and 5 USC 552 and 552(a) et. seq., and certainly not from the First and Fifth Amendments to the U.S. Constitution.

The question of "excepted service" has already been treated in Ashton v. Civiletti, F. 2nd 923 (D.C.C. 1979) where it was decided that "excepted service" status does not deprive FBI employees of procedural due process. See also Carey v. Piphus, 55 L Ed 2d 252, where this court said that the right to procedural due process is "absolute."

More recent cases have found that transfer and other personnel actions involving Federal employees may not be based on protected speech. Delong v. U.S., 621 F. 2nd 618 (1980) at 624. See also Johnson v. Bergland, 586 F. 2nd 993 (1978).

Consequently, it is respectfully submitted that the petition for writ of certiorari should be granted.

Louis S. Bullard
Pro Se

April, 1981